APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-906

UNITED AIR LINES, INC.,

Petitioner,

vs.

HARRIS S. McMANN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

PETITION FOR CERTIORARI FILED DECEMBER 30, 1976
CERTIORARI GRANTED FEBRUARY 22, 1977

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APPENDIX.

DOCKET ENTRIES

Date	Proceedings
1/31/75	Complaint—filed.
2/ 3/75	Summons (Original and one) with copy of complaint issued and given to Marshall for service.
2/13/75	Marshal's return on summons executed—filed.
3/ 7/75	Answer—filed by Deft. United Air Lines, Inc.
3/26/75	Order extending the deft. United Air Lines, Inc.'s time to answer by ten days entered—filed. Copies sent. (AVB)
3/31/75	Pretrial Order (AVB) entered and filed, cutoff for all discovery is July 11, 1975, formal pretrial set for July 15, 1975 at 10:40 A.M. Copies sent.
7/15/75	Formal Pretrial: (AVB) Appearances of counsel. Case set for trial by the court 8/27/75.
7/15/75	Defendant's list of witnesses—filed.
7/15/75	Pltf's list of witnesses—filed.
7/15/75	Stipulation of facts—filed.
7/24/75	Motion for summary judgment filed by the deft's.
7/24/75	Memorandum of law in support of deft's. motion for summary judgment filed.
7/24/75	Notice returnable for August 1, 1975 for hearing on deft's. motion for summary judgment filed.
7/28/75	Motion for Summary Judgment filed by Plaintiff.
7/28/75	Memorandum of Law in support of Plaintiff's motion for summary judgment filed.

7/28/75	Notice returnable Aug. 1, 1975 on Plaintiff's motion for summary judgment.
7/29/75	Deft's. response to pltf's motion for summary judgment—filed.
8/ 1/75	Trial Proceedings: J. Bryan. This matter came on for hearing on cross motions for summary judgment. Appearances of counsel. Motions argued and granted as to defts. motion.
9/ 2/75	Order granting summary judgment to deft. and dismissing cause entered and filed. Copies sent. (AVB)
9/29/75	Notice of appeal—filed by the pltf.
11/11/75	Record on appeal in one volume, Vol. I, filed and appeal docketed. bjm
11/11/75	Transcript of proceedings in one volume, Vol. II, filed. bjm
11/11/75	Briefing schedule established. bmj
11/18/75	Appearance for the appellant filed and entered. (fls)
11/18/75	Appearance for the appellee filed and entered. (fls)
11/21/75	Appearance for the appellee filed and entered. (fls)
12/18/75	Motion for enlargement of time for filing of appellant's brief and appendix to January 21, 1976 filed. Motion granted. jab
12/29/75	Appearance for the appellee filed and entered. (fls)
1/21/76	Ten (10) copies of the joint appendix filed. (whf)
1/21/76	Order allowing Secretary of Labor for leave to file brief as Amicus Curiae and extending time to file said brief to 1/30/76. (fls)

1/21/76	Twenty-five (25) copies of the appellant's brief filed. (whf)
2/ 2/76	Motion of the amicus curiae for an extension of time to file brief to February 3, 1976, filed. Motion granted. (fls)
2/ 4/76	Twenty-five (25) copies of the amicus brief filed. (Sec. of Labor) (WTC)
3/ 1/76	Twenty-five (25) copies of the appellee's brief filed. (whf)
3/22/76	Motion of the Secretary of Labor for leave to present oral argument as amicus curiae filed. epb —Send to panel when set for oral argument. CRL
3/26/76	Appearance for the amicus curiae filed and entered. (fls)
5/20/76	Motion for amicus curiae for leave to present oral argument, filed 3/22/76, transmitted to CFH, HLW, JBC. epb
6/10/76	Cause argued before Haynsworth, Chief Judge, Winter & Craven, Circuit Judges and and submitted. (rwr)
8/18/76	Letter with attachments from Joseph A. Rafferty, Jr., transmitted to CFH, HLW, JBC. epb
10/ 1/76	Opinion filed. (HLW) (cfw)
10/ 1/76	Opinion mailed to counsel of record and the Clerk of the Alexandria, Va. district court. (cfw)
10/ 1/76	Judgment of the district court reversed and remanded. Judgment filed. (cfw)
10/13/76	Appellant's verified bill of costs received. (jhl)
10/22/76	Certified copy of the judgment and printed copy of the opinion transmitted to the Clerk of the District Court at Alexandria, Va.

10/22/76 Record on appeal in one volume and transcript in one volume returned to the Clerk of the District Court at Alexandria, Va. (jhl)

1/10/77 Notice evidencing the filing petition for writ of certiorari in the Supreme Court December 30, 1976 filed. (No. 76-906) (jhl)

3/ 3/77 Certified copy of order of the Supreme Court granting certiorari February 22, 1977 filed. (jhl)

3/ 7/77 Record on appeal in one volume and transcript in one volume received from the Clerk of the District Court at Alexandria, Va.

3/ 7/77 Certified record in three volumes transmitted to the Clerk of the Supreme Court. (jhl)

IN THE UNITED STATES DISTRICT COURT
for the Eastern District of Virginia
(Alexandria Division)

HARRIS S. McMANN, *Plaintiff,*
vs.
UNITED AIR LINES, INC., *Defendant.*

Civil Action No. 72-75-A

COMPLAINT

Plaintiff, by his attorney, Francis G. McBride, complaining of defendant, alleges as follows:

Jurisdiction and Venue

1. This complaint is filed and these proceedings are instituted under the Age Discrimination in Employment Act (29 U. S. C. §§ 621 et seq.), and 29 U. S. C. §§ 211(b); 216 (except subsection (a)); 217; and 626, for its violations of the Age Discrimination in Employment Act.

2. The defendant herein named transacts business in the Eastern District of Virginia. The acts herein complained of occurred in whole or in part within the Eastern District of Virginia.

Description of Parties

3. Plaintiff Harris S. McMann was born January 23, 1913, and is now 62 years of age. He was employed by defendant from April 14, 1944 until January 31, 1973, in various capacities, and, most recently, as a "Technical Specialist—Aircraft Systems". Effective February 1, 1973, defendant retired the plaintiff involuntarily, and solely upon the grounds that the plaintiff had passed his 60th birthday.

4. Defendant United Air Lines, Inc., is a Delaware corporation engaged in the business of commercial air transportation on a regularly scheduled basis.

Violations

5. Such involuntary retirement of the plaintiff at his 60th birthday constituted an act of discrimination based solely upon age, and as such was unlawful under the Age Discrimination in Employment Act (81 Stat. 602 (1967)), specifically § 4(a).

Notice

6. Notice of intent to file this suit was sent to the Secretary of Labor more than 60 days prior to the commencement of this suit, as required by § 7(d) of the Act.

WHEREFORE, the plaintiff prays that this Court:

1. Adjudge and decree that the acts of defendant as hereinbefore described are and continue to be in violation of § 4(a) of the Age Discrimination Act.

2. Issue a permanent injunction against defendant, enjoining the continued unlawful practices herein alleged.

3. Declare the retirement of plaintiff to be an unlawful act of age discrimination, and to order that the plaintiff be reinstated to his position as "Technical Specialist—Aircraft Systems", or alternatively, as a Second Officer.

4. Issue a permanent injunction restraining the defendant from retiring or dismissing the plaintiff after reinstatement until his 65th birthday.

5. Award as damages and as back pay the salary of the plaintiff during the period of his involuntary retirement, as provided in the Act.

6. Grant such other and further and different relief as the Court shall deem just.

FRANCIS G. MCBRIDE
Attorney for Plaintiff

Suite 911, The Honeywell Center
7900 Westpark Drive
McLean, Virginia 22101
(703) 893-0602

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Virginia
Alexandria Division

HARRIS S. McMANN,
10711 Howerton Avenue,
Fairfax, Virginia 22030,
Plaintiff,

vs.

UNITED AIR LINES, INC.,
P. O. Box 66100,
Chicago, Illinois 60666,
Defendant.

Civil Action
No. 72-75-A

ANSWER

Now comes the defendant, United Air Lines, Inc., and for answer to the Complaint states as follows:

1. Defendant admits that plaintiff purports to bring this action under the Age Discrimination in Employment Act, 29 U. S. C., Section 621 et seq. and 21 U. S. C., Section 211(b), 216 (except subdivision a), 217 and 626, but denies that defendant has violated the Act or these provisions and denies that the jurisdictional prerequisites of the Act have been met.

2. Defendant admits that it transacts business in the Eastern District of Virginia but denies the remaining allegations of paragraph 2 of the Complaint.

3. Defendant admits the allegations of paragraph 3 of the Complaint except that defendant denies that it retired the plaintiff "solely" upon the ground that the plaintiff had passed his 60th birthday. Answering further, defendant avers it involuntarily retired the plaintiff in accordance with the terms of a bonafide benefit plan under which plaintiff was a member.

4. Defendant admits the allegations of paragraph 4 of the Complaint.

5. Defendant denies the allegations of paragraph 5 of the Complaint.

6. Defendant admits the allegations of paragraph 6 of the Complaint.

FIRST AFFIRMATIVE DEFENSE

The Complaint fails to state a cause of action upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

The Complaint is insufficient in law in that it fails to allege or demonstrate that plaintiff has complied with all jurisdictional requirements set forth in 29 U. S. C., Section 626(d).

THIRD AFFIRMATIVE DEFENSE

The Complaint was not filed within two years after the alleged act of discrimination and is barred by the two year statute of limitation specified in 29 U. S. C., Section 626(e).

FOURTH AFFIRMATIVE DEFENSE

Plaintiff was retired at age 60 in accordance with the terms of a bonafide Employee Benefit Plan within the meaning of Section 4(f)(2) of the Act and Section 860.110 of the Secretary of Labor's interpretation of the Act.

WHEREFORE, defendant prays that plaintiff take nothing from his Complaint and that the said Complaint be dismissed with costs.

Respectfully submitted.

/s/ JOHN F. GIONFRIDDO
John F. Gionfriddo
410 Pine Street, SE
Vienna, Virginia

/s/ JOSEPH A. RAFFERTY, JR.
Joseph A. Rafferty, Jr.
888 - 17th Street, N. W.
Washington, D. C. 20006
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Of Counsel:
EARL G. DOLAN
KENNETH A. KNUTSON
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P. O. Box 66100
Chicago, Illinois 60666
[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Virginia
Alexandria Division

HARRIS S. McMANN, *Plaintiff,*
vs.
UNITED AIR LINES, INC., *Defendant.*
Civil Action No. 72-75-A

STIPULATION OF FACTS

The parties hereby stipulate to the following facts:

1. Defendant is and at all times material hereto has been an Employer within the meaning of the Age Discrimination in Employment Act of 1967.

2. Plaintiff was born on January 23, 1913.

3. Plaintiff was hired by Defendant on April 14, 1944 and served Defendant in various capacities, most recently as a "Technical-Specialist—Aircraft Systems."

4. At the time Plaintiff was hired by Defendant on April 14, 1944, Defendant had in existence a formal retirement income plan (hereinafter referred to as the "Plan") which provided for benefits to employees who joined the Plan. These benefits were arranged through a group annuity contract issued jointly by Connecticut General and John Hancock Mutual Life Insurance Companies.

5. Participation in the Plan by employees was purely voluntary.

6. From time to time during his employment, prior to 1964, Plaintiff was given opportunity to join the Plan, but elected not to do so. On December 18, 1950, Plaintiff signed a card acknowledging that he was offered opportunity to join the Plan and declined.

7. On January 23, 1964 Plaintiff elected for the first time to participate in the Plan as applicable to non-union flight employees and signed an application card applying to join the Plan effective as of February 1, 1964. The application card signed by Plaintiff shows on its face that the normal retirement age for employees in his classification was age 60. A true copy of the card signed by Plaintiff is attached as Stipulation Exhibit No. 1.

8. In 1965, employees in Plaintiff's job classification were transferred from that part of the Plan applicable to non-union flight employees to that part of the Plan applicable to union flight employees. No change was made in the normal retirement age of 60 as applicable to Plaintiff.

9. Plaintiff was retired on the first day of the month following the date of his 60th birthday; i.e., he was retired on February 1, 1973.

10. On an annual basis from the time he joined the Plan in 1964 until he retired in 1973, Plaintiff received a statement showing his estimated benefits under the Plan at the time of his retirement. In each statement sent to him in each year from 1964 until 1973, reference was made—and his estimated earnings were calculated—on a retirement age of 60. A copy of the statement sent to him in 1964 is attached as Stipulation Exhibit No. 2.

11. From time to time Defendant sends to its employees information booklets describing the salient features of the Plan as applicable to them. Plaintiff was among those sent copies of the booklets describing the Plan. In each case, the booklet sent Plaintiff described the normal retirement age as age 60.

12. Plaintiff has collected benefits under the Plan since his retirement on February 1, 1973. These benefits varied in amount depending on the value of the units in the Plan.

13. In March, 1973, Plaintiff was given supplemental payments by Defendant in accordance with the letter to him attached as Stipulation Exhibit No. 3.

14. Plaintiff filed a grievance with the Defendants claiming his involuntary retirement violated provisions of the Pilots' collective bargaining agreement. His grievance was denied in arbitration. A copy of the award is attached as Stipulation Exhibit No. 4.

15. Plaintiff filed notice of intent to sue Defendant with the Secretary of Labor pursuant to the Age Discrimination in Employment Act of 1967. Following conferences between representatives of the Department of Labor and attorneys for Plaintiff and Defendant, the Department's regional attorney wrote Plaintiff and Defendant and advised the parties that the retirement income plan of Defendant "is a bona fide employee plan within the meaning of Section 4(f)(2) of the Age Discrimination in Employment Act." A copy of the letter received by Defendant is attached as Stipulation Exhibit No. 5.

16. Plaintiff filed his notice of intent to sue Defendant more than 60 days prior to the commencement of his lawsuit.

For Plaintiff
/s/ FRANCIS G. MCBRIDE
Attorney

For Defendant
/s/ EARL G. DOLAN
Attorney

Dated July 15, 1975

H	S	McMANN		701234	DC 1	5170	2940	P	8	1	13	4	19	44					
FIRST NAME	INITIAL	LAST NAME	SEX	FILE NO.	LOCATION	ORGANIZATION	JOB OCCUPATION CODE	G.P.	P/S	MO.	DAY	YR.	MO.	DAY	YR.	MO.	YR.		
										BIRTH DATE			CO SEN DATE			ELIG. DATE			

UNITED AIR LINES

RETIREMENT INCOME PLAN APPLICATION CARD

I hereby apply for participation in the UAL Retirement Income Plan for which I am or may become eligible as such Plan may from time to time exist or be amended. I designate the beneficiary(ies) shown hereon as my beneficiary (ies) for all coverage under said Plan, and authorize United Air Lines, Inc. to deduct from my earnings such amount as may be payable by me from time to time under the provisions of such plan.

BENEFICIARY(IES) AND RELATIONSHIP

FIRST NAME	INITIAL	LAST NAME	RELATIONSHIP
Ernestine	H.	McMann	Wife

EMPLOYEES SIGNATURE Harold S. McMann

DATE SIGNED Jan. 23, 1964

FOR EXOIN USE ONLY	ENTRY DATE	INS. BIRTH YEAR	NRA	NRD
22 B	2-1-64	1913	60	2-1-73

STIPULATION EXHIBIT NO. 1.

STIPULATION EXHIBIT NO. 2.

OFFICE COPY

UNITED AIR LINES

RETIREMENT INCOME PLAN

1964

EMPLOYEE'S ANNUAL STATEMENT, DECEMBER 31, 1964

NAME	COMPANY ADDRESS	DEPARTMENT NUMBER	SOCIAL SECURITY NUMBER	PLAN CODE	BENEFICIARY	
H S MC MANN	DCAFO	8170	1234	33	ERNESTINE H	W

FIXED BENEFIT PART

1 YOUR CONTRIBUTIONS TO DATE $ 632.08

2 YOUR CONTRIBUTIONS TO DATE WITH INTEREST 632.08

3 YOUR ANNUAL RETIREMENT INCOME FOR PARTICIPATION TO DATE, STARTING AT NORMAL RETIREMENT AGE 60 237.03

4 YOUR ESTIMATED ANNUAL RETIREMENT INCOME FOR PARTICIPATION FROM THE DATE OF THIS STATEMENT TO YOUR NORMAL RETIREMENT DATE

0	x	

5 ASSUMING NO OPTIONAL FORM OF ANNUITY ELECTED, YOUR ESTIMATED TOTAL ANNUAL RETIREMENT INCOME AT NORMAL RETIREMENT DATE FROM THE FIXED BENEFIT PART (ITEMS 3 + 4)

VARIABLE BENEFIT PART

6 YOUR CONTRIBUTIONS TO DATE $ 790.11

7 CURRENT VALUE OF YOUR CONTRIBUTIONS TO DATE 790.11

8 YOUR ANNUAL RETIREMENT INCOME FOR PARTICIPATION TO DATE, STARTING AT NORMAL RETIREMENT AGE 60

A YOUR TOTAL BENEFIT UNITS TO DATE 6.106

B CURRENT VALUE OF EACH BENEFIT UNIT $ 25.018

A TIMES B 152.76

9 YOUR ESTIMATED ANNUAL RETIREMENT INCOME FOR PARTICIPATION FROM THE DATE OF THIS STATEMENT TO YOUR NORMAL RETIREMENT DATE

0	x		x	$ 25.018

10 ASSUMING NO OPTIONAL FORM OF ANNUITY ELECTED, YOUR ESTIMATED TOTAL ANNUAL RETIREMENT INCOME AT NORMAL RETIREMENT DATE, FROM THE VARIABLE BENEFIT PART (ITEMS 8 + 9)

ADDING THE AMOUNTS OF ITEMS 5 AND 10, AND INCLUDING YOUR ESTIMATED SOCIAL SECURITY BENEFITS PAYABLE AT AGE 65 * YOUR TOTAL ANNUAL RETIREMENT INCOME FROM THESE SOURCES AFTER AGE 65 WILL BE $

1 The letter following a name in this space indicates the relationship of your beneficiary

W wife — M mother — S son or son — B brother — U uncle — N nephew or niece
H husband — F father — D daughter — I other — G grandmother

If no name appears in this space, your beneficiary designation is too long to be reproduced here. Shown instead is the date of your last beneficiary change. As your circumstances change, you may name a new beneficiary on forms obtainable from your supervisor or EDDIE

2 If you have been a member of the Plan for less than a year, your estimated retirement income will appear on your next statement

3 Social Security benefits normally become payable at age 65. At present rates your maximum benefits are $1,524 annually

4 To determine your contributions to the Plan combine items 1 and 6

STIPULATION EXHIBIT NO. 3

March 15, 1973

Mr. H. S. McMann
10711 Howerton Avenue
Fairfax, Virginia 22030
Dear Mr. McMann:

When your pension plan payments started at your normal retirement date, February 1, 1973, they were less than what you may have been expecting to receive based upon the minimum benefit provisions of the plan in effect prior to June 1, 1972. As a result, United has decided that supplemental retirement income should be provided to you by direct payments from the Company.

The initial amount of the monthly payments will be $420.00 which recognizes the approximate difference between what you would have received monthly under the old minimum benefit provisions had you retired without a retirement option and the monthly payments that you in fact received also calculated without reference to a retirement option. Payments to you in this monthly amount will continue until January 1, 1974 at which point the monthly amount will be reduced by $5.00. On each July 1 and January 1 thereafter, the amount will be further reduced by an additional $5.00 until the amount of the monthly payment to you is less than $25.00 at which time further payments will be discontinued. This scheduled periodic reduction anticipates the possible long term improvements in the variable pension benefit payments you are receiving. Calculation of the amount of the direct monthly payment to you without regard to the 10-year certain option you elected under the pension plan produces a higher direct monthly payment than if such option had been considered in making the calculation. The reason for not considering the option is that these direct payments would not be continued after your death.

You will soon receive a check in the amount of $840.00 representing the two monthly payments for February and March and your monthly check for April should be received about the first of that month.

We are attaching our letter to Captain Arsenault which more specifically details the Company decision.

If you have any questions concerning this supplemental retirement income payment, please contact Jerry Howland, EXOIN.

Very truly yours,

/s/ CLARK E. LUTHER
Clark E. Luther
Vice President
System Personnel

Att.
cc: W. E. Arsenault
G. P. Howland

STIPULATION EXHIBIT NO. 4

UNITED AIR LINES PILOTS SYSTEM BOARD OF ADJUSTMENT

No. 73-10

In the matter of

HARRIS S. McMANN

AWARD

This case arises out of a grievance filed by Harris S. McMann complaining of his forced retirement following his 60th birthday. On April 23, 1973 Airline Pilots Association submitted the dispute to the System Board of Adjustment on behalf of the grievant, with a request that a fifth and neutral member sit with the Board at the initial hearing.

The hearing was held at the Executive Offices of United on October 13, 1972. Mr. McMann was separately represented by Francis G. McBride, Esq., who pressed the grievance in his behalf. ALPA, appearing by its attorney Charles W. Goldstein, Esq., presented views on some points of jurisdiction but took no position on the merits. Earl G. Dolan, Esq. appeared for United Air Lines.

United filed a motion to dismiss upon which the System Board reserved ruling pending receipt of evidence on the merits. Both parties were afforded a full opportunity to present evidence and argument thereon. Thereafter the System Board met in executive session and upon full consideration of the submission, the motion to dismiss or limit the issues, the evidence, argument and entire record in this proceeding it hereby awards:

1. The grievant has failed to make out either a violation or an erroneous interpretation or application of the Pilots Agreement or any other meritorious grievance within the jurisdiction of the System Board of Adjustment.

2. The grievance is dismissed without prejudice to any rights or remedies independent of the Pilots Agreement,

which may be available to the grievant under Executive Order No. 11141, 29 Fed. Reg. (February 15, 1964) 2477 or the Age Discrimination Act of 1967.

September 13, 1974

/s/ ARCHIBALD COX
/s/ ROBERT S. CRUMP
/s/ EDWARD J. KELLY
/s/ RUSSELL J. MILLER
/s/ STUART BERNSTEIN

OPINION OF THE NEUTRAL MEMBER

I.

United moved to dismiss this case upon the ground that Mr. McMann's letter of grievance complained of his removal from the position "Technical Specialist—Aircraft Systems" and requested his reinstatement to that position; the position—United argues—is a managerial post outside the scope of the Pilots Agreement and therefore the System Board has no jurisdiction to grant the only relief requested.

Counsel for the grievant virtually conceded that the System Board has no power to protect a "Technical Specialist—Aircraft Systems" provided that neither his right to return to the position of Second Officer nor any of his rights as a Second Officer are affected (Tr. 43-5). ALPA counsel did not dispute the point although he was unwilling to take a position (Tr. 49-52). Counsel for the grievant replied to United's argument by saying that the forced retirement of Mr. McMann is subject to challenge because it did cut off his right to return to the position of Second Officer under the Pilots Agreement and did terminate his seniority and accompanying rights under the Agreement.

United seemed to agree, through its attorney, that if Mr. McMann had so stated his claim, it would not be vulnerable to the objection now under consideration (Tr. 63-5). But—counsel agrees—the grievance made no such claim and the present, additional formulation comes too late.

The letter of grievance does not limit itself to complaint of the loss of a right to resume status as a pilot and the accompanying rights under the Pilots Agreement; indeed it does not specifically mention such status and rights. On the other hand, anyone reading the letter with a little imagination would realize that Mr. McMann was complaining of every aspect of his forced retirement and seeking to assert any and every right that he might have. Again, although only reinstatement to "Technical

Systems—Aircraft Specialist" is requested, it is hard to believe that Mr. McMann meant to abjure lesser remedies.

So generous a reading might be inappropriate if United were prejudiced or the purposes of the grievance procedure were defeated by allowing Mr. McMann to go forward. But United is nowise prejudiced, and the development of the case was affected in no substantial respect.* There is not the slightest possibility that a better-phrased grievance would have been adjusted. No research of any character was omitted. No issues have been interjected that might benefit from further deliberation between the parties or by either side.

The objection raised in paragraphs I and 5 of the Motion to Dismiss is therefore over-ruled.

II.

Paragraph 6 of the Motion to Dismiss asserts that the System Board has no jurisdiction because "no provision of the Collective Bargaining Agreement between United and its pilots concerning retirement age is alleged to have been breached."

There is indeed little claim and not even a colorable showing that the United violated any contractual obligation. None is claimed except for the argument that because good health and fitness for duty call for retaining a participant beyond the age of 60 "normal" means "average" in Section 5 of the Pilot Variable Retirement Plan, which provides—

* At the initial and appeals levels of the grievance procedure, United denied Mr. McMann a hearing because it read the grievance as limited to Mr. McMann's claim to resume his management position. This was not an unreasonable interpretation and, prior to the Submission, Mr. McMann did nothing to clarify the point. The Submission, which does refer to Mr. McMann's status as a pilot, requests, as one possible form of relief, that the matter be remanded for a hearing. A remand would serve no useful purpose. United's position here makes it plain that the grievance would be denied. We decide the case, therefore, as if all prior procedural steps had been fully satisfied.

> "The normal retirement age shall be the 60th birthday of a Participant, Inactive Participant or Terminated Participant."

The argument is unpersuasive. "Normal" means regular or standard, not average, not only as a matter of linguistics but also in the general context of retirement and pension plans and the settled practice at United.*

The primary response of both the grievant and ALPA to paragraph 6 of the United's motion is that the System Board's jurisdiction is not confined to "disputes growing out of . . . interpretation or application of any of the terms" of the Pilot's Agreement but extends also to "disputes growing out of grievances" (see Section 18-C1).

We have no need to face the issue in such broad terms nor to offer a general definition of grievances. Nor is it necessary to say that the System Board can—or cannot—consider questions of law. The only question is whether the System Board can consider the kind of claim that the grievant presents. His claim has a number of unusual characteristics:

1. The action of which the grievant complains does not violate any obligation, express or implied, under the Pilot's Agreement.

2. The action of which the grievant complains was taken in accordance with an established practice uniformly applied to all members of the bargaining unit. It is obvious, therefore, that the grievant has no case except as an attack upon the unit-wide practice.

3. Fixing the retirement age under an annuity plan is a very fundamental aspect of employment policy and/or collective bargaining, not a matter arising in the day-to-day operation of a business or in the day-to-day work of its employees.

4. The practice was widely known and firmly established at the time the Pilots Agreement was negotiated. The United Pilots'

* The above observations do not imply that the System Board has jurisdiction over alleged violations of the Plan.

negotiators could have required United to bargain about proposed changes. They did bargain about other aspects of the plan. In this sense the negotiators on both sides accepted the practice as a fundamental rule of the industrial jurisprudence governing the bargaining unit.

5. Other peaceable remedies are available for violation of the statute and/or executive order cited by the grievant. Under the rulings of the Supreme Court in analogous cases, a System Board decision could not have finality with respect to these claims.

These five characteristics, taken together, are fatal to the grievant's case as presented here. Whatever the exact scope of Section 18-C1, it does not authorize relief in a situation where the System Board concludes that United's action not only does not violate any express or implied obligation under the Pilots Agreement but also is wholly consistent with fundamental expectations and practices set forth in writing and prevailing throughout the bargaining unit at the time the Agreement was signed. Nothing more need be, or is, decided now.

C.

Since the System Board is not authorized to grant relief based upon an executive order or statute under the circumstances of the present case, our decision is without prejudice to any administrative or judicial remedies for alleged violation thereof.

September 12, 1974

/s/ ARCHIBALD COX
Archibald Cox

AC:wm

STIPULATION EXHIBIT NO. 5

U. S. DEPARTMENT OF LABOR
Wage and Hour and Public Contracts Division
Federal Building, 400 N. Eighth Street
Richmond, Virginia

Date: January 18, 1973
Reply to
Attn of: Harris S. McMann
Subject: Age Discrimination Claim

To: Mr. Earl G. Dolan, Director
Personnel Legal Affairs
United Air Lines
P. O. Box 66100
Chicago, Illinois 60666

This is in further reference to the above styled matter insofar as the Age Discrimination in Employment Act of 1967 is concerned.

Following my conference with you in this office and my earlier conference with Mr. Francis G. McBride, Attorney for Mr. McMann, I referred the issue of your company's pending involuntary retirement of Mr. McMann, to be effective February 1, 1973, to our Regional Attorney at Nashville, Tennessee.

Regional Attorney Marvin Tincher has now advised that the retirement plan of your company is a bona fide employee benefit plan within the meaning of Section 4(f)(2) of the Age Discrimination in Employment Act. Further, he has held, that since the plan was adopted many years prior to the effective date of the indicated Act, it would not appear that the plan is a subterfuge to evade the purposes of the Act.

In view of the above, this office contemplates no further action with respect to this matter and has advised Mr. McBride to that

effect and that we are closing our file. Should you have any questions relative to the above, please feel free to write this office.

/s/ ROBERT F. FERGUSON, JR.
Robert F. Ferguson, Jr.
Area Director

IN THE UNITED STATES DISTRICT COURT,
For the Eastern District of Virginia,
Alexandria Division.

HARRIS S. McMANN,
Plaintiff,

vs.

UNITED AIR LINES, INC.,
Defendant.

Civil Action
No. 72-75-A

ORDER GRANTING SUMMARY JUDGMENT.

This matter having come on for hearing before the Court on August 1, 1975, on cross-motions for summary judgment, the Court having read and considered the pleadings and having heard oral argument of counsel for the respective parties makes the following findings of fact as stipulated to by the parties:

FINDINGS OF FACT.

1. Defendant is and at all times material hereto has been an Employer within the meaning of the Age Discrimination in Employment Act of 1967.

2. Plaintiff was born on January 23, 1913.

3. Plaintiff was hired by Defendant on April 14, 1944 and served Defendant in various capacities, most recently as a "Technical-Specialist—Aircraft Systems."

4. At the time Plaintiff was hired by Defendant on April 14, 1944, Defendant had in existence a formal retirement income plan (hereinafter referred to as the "Plan") which provided for benefits to employees who joined the Plan. These benefits were arranged through a group annuity contract issued

jointly by Connecticut General and John Hancock Mutual Life Insurance Companies.

5. Participation in the Plan by employees was purely voluntary.

6. From time to time during his employment, prior to 1964, Plaintiff was given opportunity to join the Plan, but elected not to do so. On December 18, 1950, Plaintiff signed a card acknowledging that he was offered opportunity to join the Plan and declined.

7. On January 23 ,1964, Plaintiff elected for the first time to participate in the Plan as applicable to non-union flight employees and signed an application card applying to join the Plan effective as of February 1, 1964. The application card signed by Plaintiff shows on its face that the normal retirement age for employees in his classification was age 60.

8. In 1965, employees in Plaintiff's job classification were transferred from that part of the Plan applicable to non-union flight employees to that part of the Plan applicable to union flight employees. No change was made in the normal retirement age of 60 as applicable to Plaintiff.

9. Plaintiff was retired on the first day of the month following the date of his 60th birthday; *i.e.*, he was retired on February 1, 1973.

10. On an annual basis from the time he joined the Plan in 1964 until he retired in 1973, Plaintiff received a statement showing his estimated benefits under the Plan at the time of his retirement. In each statement sent to him in each year from 1964 until 1973, reference was made—and his estimated earnings were calculated—on a retirement age of 60.

11. From time to time Defendant sends to its employees information blooklets describing the salient features of the Plan as applicable to them. Plaintiff was among those sent copies of the booklets describing the Plan. In each case, the booklet sent Plaintiff described the normal retirement age as age 60.

12. Plaintiff has collected benefits under the Plan since his retirement on February 1, 1973. These benefits varied in amount depending on the value of the units in the Plan.

13. In March, 1973, Plaintiff was given supplemental payments by Defendant.

14. Plaintiff filed a grievance with the Defendant claiming his involuntary retirement violated provision of the Pilots' collective bargaining agreement. His grievance was denied in arbitration.

15. Plaintiff filed notice of intent to sue Defendant with the Secretary of Labor pursuant to the Age Discrimination in Employment Act of 1967. Following conferences between representatives of the Department of Labor and attorneys for Plaintiff and Defendant, the Department's regional attorney wrote Plaintiff and Defendant and advised the parties that the retirement income plan of Defendant "is a bona fide employee plan within the meaning of Section 4(f)(2) of the Age Discrimination in Employment Act."

16. Plaintiff filed his notice of intent to sue Defendant more than 60 days prior to the commencement of his lawsuit.

17. That the plaintiff was covered by the Age Discrimination in Employment Act of 1967, 29 USC § 621 *et seq*. amended by P. L. 90-202 effective May 1, 1972.

18. Title 29 USC § 623(f)(2) expressly provides that it shall not be unlawful for any employer:

> ". . . to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual."

19. Plaintiff was retired in accordance with the terms of such a bona fide benefit plan within the meaning of Title 29 USC § 623(f)(2).

Accordingly, the Court concludes as follows:

CONCLUSIONS OF LAW.

1. That there are no material issues of fact and defendant, United Air Lines, Inc., is entitled to judgment as a matter of law.

ORDER.

It therefore this 2nd day of September, 1975.

ORDERED, That the plaintiff's motion for summary judgment be and the same hereby is denied and it is further,

ORDERED, That the defendant's motion for summary judgment be and the same is hereby granted and it is therefore,

ORDERED, That the Complaint herein be and the same hereby is finally dismissed.

ALBERT V. BRYAN, JR.,
Judge.

CERTIFICATE OF SERVICE.

I hereby certify that a copy of the foregoing Order was mailed, postage prepaid, to Francis G. McBride, Esquire, Attorney for Plaintiff, Suite 911, 7900 Westpark Drive, McLean, Virginia 22101, this 13th day of August, 1975.

/s/ JOSEPH A. RAFFERTY, JR.
Joseph A. Rafferty, Jr.

UNITED STATES COURT OF APPEALS,
For the Fourth Circuit.

No. 75-2206

HARRIS S. MCMANN,
Appellant,

vs.

UNITED AIR LINES, INC.,
Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge.

Argued June 10, 1976—Decided October 1, 1976

Before HAYNSWORTH, *Chief Judge* and WINTER and CRAVEN, *Circuit Judges.*

Francis G. McBride for Appellant, Carin Ann Clauss Associate Solicitor, U. S. Department of Labor (William J. Kilber, Solicitor of Labor, Jacob I. Karro, Attorney, U. S. Department of Labor on brief) as Amicus Curiae; Joseph A. Rafferty, Jr. (Earl G. Dolan on brief) for Appellee.

WINTER, *Circuit Judge:*

This appeal presents a narrow issue: Does the Age Discrimination in Employment Act, 29 U. S. C. §§ 621, *et seq.*, proscribe the retirement of an employee at age 60 when retirement

is brought about solely because of his membership in an employees' retirement plan which contains a provision making retirement mandatory at that age and when the effective date of the retirement plan preceded the effective date of the Act? The answer to the question turns on whether a preexisting pension plan which requires retirement prior to age 65 falls within the exception contained in 29 U. S. C. § 623(f)(2), "[i]t shall not be unlawful for an employer . . . to observe . . . any bona fide employees benefit plan . . . which is not a subterfuge to evade the purposes [of the Act]." The district court thought the exception applicable, relying principally on *Brennan* v. *Taft Broadcasting Co.*, 500 F. 2d 212 (5 Cir. 1974). Despite *Brennan* and other authorities, we conclude otherwise. We reverse the summary judgment awarded the employer and remand the case for further proceedings.

I.

The relevant facts are largely stipulated. McMann was hired by United Air Lines (United) in 1944, and served in various capacities, most recently as a "Technical Specialist-Aircraft Systems," until his retirement on February 1, 1973. At the time McMann was hired, United had in effect an employee retirement plan, participation in which was voluntary at the option of employee.[1] Initially, McMann decided not to join the plan. However, in 1964, he elected to participate. The application card he signed, and subsequent documents he received, showed that the "normal retirement age" for employees in his job category was 60.

1. We attach no significance to the fact that McMann could have chosen not to joint the plan. Realistically, an employee's decision whether or not to forego lucrative benefits, funded in part by employer contributions he would not otherwise receive, is not "voluntary" in the sense we think it would have to be in order to find a waiver of statutory protection. Moreover, we doubt that Congress intended employees and employers, either individually or in collective bargaining, to be able to waive rights granted by the Act. There is little question that an attempt to condition employment itself on the surrender of protection against discharge because of age would be legally ineffectual; we see no reason why participation in a retirement plan should be treated differently.

While the meaning of the word "normal" in this context is not free from doubt, counsel agreed in oral argument on the manner in which the plan is operated in practice. The employee has no discretion whether to continue beyond the "normal" retirement age. United legally may retain employees such as McMann past age 60, but has never done so: its policy has been to retire all employees at the "normal" age. Given these facts, we conclude that for purposes of this decision, the plan should be regarded as one requiring retirement at age 60 rather than one permitting it at the option of the employer.[2]

McMann was retired at age 60, in compliance with the plan. It is conceded that the plan is "bona fide" in the sense that it exists and pays benefits. United presented no evidence, however, to show that the provision of its plan requiring retirement at age 60 had any purpose other than arbitrary age discrimination. It sought and obtained summary judgment solely on the theory that since its plan was indisputably adopted prior to the effective date of the 1967 Act, (June 12, 1968) the mandatory retirement provision contained therein was not proscribed.[3]

2. If we were to treat the plan as one permitting United to retire employees at age 60 or later, at its option, we would face the situation confronted by the court in *Brennan, supra.* There, Judge Tuttle argued forcefully in dissent that, "at the very least," to qualify for the exemption early retirement pursuant to a plan would have to be *compulsory* on both the employee and the employer. 500 F. 2d at 220. Judge Tuttle drew support for this conclusion from the statutory language, "it shall not be unlawful for an employer . . . to *observe* the terms of a bona fide" plan. (Emphasis added.) Arguably, if under a plan the employer has discretion not to retire an employee, the employee's discharge is not action taken "to observe" the terms of the plan.

3. Our reversal of United's summary judgment does not finally decide this case even though most of the operative facts have been stipulated. United may have other valid defenses. For example, we note that the Act provides another exemption where age is a "bona fide occupational qualification." 29 U. S. C. § 623(f)(1). United may raise this defense on remand. Of course, we express no opinion as to its applicability to McMann, whose principal duties apparently did not involve flying airplanes, but were managerial in nature. We note, however, that the burden of proving the elements required for

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II.

The Age Discrimination in Employment Act generally prohibits an employer from discharging any individual between the ages of 40 and 65 because of age. 20 U. S. C. §§ 623(a)(1), 631. However, as previously stated, 29 U. S. C. § 623(f)(2) provides an exemption from this broad rule.[4] In pertinent part, that section provides that

> [i]t shall not be unlawful for an employer . . . to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual. . . .

The only reported appellate decision to construe this section is *Brennan* v. *Taft Broadcasting Co.*, 500 F. 2d 212 (5 Cir. 1974), decided over a sharp dissent by Judge Tuttle.[5] The

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invocation of any statutory exemption will be on United. *Cf.* Weeks v. Southern Bell Tel. & Tel. Co., 408 F. 2d 228, 232 (5 Cir. 1969) (burden on employer to show existence of elements required for bona fide occupational qualification exception under Title VII of the Civil Rights Act of 1964.)

4. United draws our attention to the Secretary of Labor's regulation, 29 C. F. R. § 860.110, which states that "the Act authorizes involuntary retirement irrespective of age." By its terms, this regulation is interpretive, not legislative. *See* 29 C. F. R. § 860.1 (views subject to change in light of court decisions or reexamination by Department of Labor). As evidenced by the Secretary's amicus curiae brief and argument, he has now concluded that the statement in the regulations is erroneous. As we understand the Secretary's present position, it is substantially in accord with the result we reach here. Thus, the regulation has no significance for our decision. We express no opinion as to whether it may provide the basis of a defense under 29 U. S. C. §§ 259, 626(e).

5. See note 2, *supra*.

Four other reported cases have discussed the benefit plan exemption. de Loraine v. Meba Pension Trust, 499 F. 2d 49 (2 Cir.), *cert. denied*, 419 U. S. 1009 (1974), did not deal with the issue presented here. The court explicitly stated: "We also decline to con-

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Brennan majority rested its holding on a reading of the "unambiguous language of the statute," 500 F. 2d at 217, and thus disregarded the legislative history and policy considerations which it conceded might support a different result. We believe the language of the statute is clear, but that the *Brennan* court's interpretation of it is erroneous.

Brennan's only discussion of the "subterfuge" clause in the statute is as follows:

> Taft's "Plan" was effectuated far in advance of the enactment of the law, eliminating any notion that it was adopted as a subterfuge for evasion. 500 F.2d at 215.

We find this statement unconvincing because what is forbidden is not a subterfuge to evade the *Act*, but a subterfuge to evade the *purposes* of the Act. These purposes are clearly spelled out in 29 U. S. C. § 621(b), and speak to concerns older than the Act itself:

> It is . . . the purpose of this chapter to promote employmetn of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

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sider at this time the argument of amicus curiae . . . that the Act prohibits involuntary retirement pursuant to a pension plan before age 65. As noted in text, plaintiff did not take this position in the district court." 499 F. 2d at 51 n. 7.

Language in Hodgson v. American Hardware Mutual Ins. Co., 329 F. S. 225 (D. Minn. 1971), which tends to support United's position, is plainly dictum. The court stated at the outset of its opinion: "The parties agree that the Plan is a bona fide employee benefit plan within the meaning of . . . the Act." 329 F. S. at 227.

Steiner v. National League of Professional Baseball Clubs, 377 F. S. 945 (C. D. Cal. 1974), is contrary to our decision. But *Steiner* offers no analysis and relies heavily on the Secretary of Labor's regulation, 29 C. F. R. § 860.110, which is no longer relevant in light of the Secretary's present position. See note 4, *supra*.

The fourth case, Dunlop v. Hawaiian Tel. Co., ... F. S. ..... (D. Hawaii, June 23, 1976), is discussed in n. 6, *infra*.

Thus, in order to qualify for the exemption, a plan must not be a subterfuge to evade the Act's purpose of prohibiting arbitrary age discrimination. Stated otherwise, there must be some reason other than age for a plan, or a provision of a plan, which discriminates between employees of different ages. At this stage of the proceedings, United has offered no non-arbitrary justification for the age 60 retirement provision in its plan.

Any other reading of the "subterfuge" clause would produce the absurd result that an employer could discharge an employee pursuant to a retirement plan for no reason other than age, but then could not refuse to rehire the presumptively otherwise-qualified individual, for 29 U. S. C. § 623(f)(2) explicitly provides that "no such employee benefit plan shall excuse the failure to hire any individual . . ." "[C]onceptually there is no difference between a mandatory retirement age of sixty-two and a refusal to hire anyone who is sixty-two years old." *Hodgson*, 329 F. S. at 229.

III.

The result we reach is fully consistent with the legislative history. While it is often said that resort to legislative history is inappropriate where the statute is clear on its face,

> when aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.' United States v. American Trucking Assns., 310 U.S. 534, 543-44 (1940) (footnotes omitted), *quoted with approval in* Train v. Colorado Public Interest Research Group, Inc., ____ U.S. ____, ____ (No. 74-1270, June 1, 1976).

The joint House-Senate report on the section of the age discrimination bill that was to become 29 U. S. C. § 623(f)(2) states:

> It is important to note that exception (3) applies to new and existing employee benefit plans, and to both the establishment and maintenance of such plans. This exception serves to emphasize the primary purpose of the bill—hiring of older workers—by permitting employment without necessarily including such workers in employee benefit plans. H. R. Rep. 805, 90th Cong., 1st Sess., 2 U.S. Code Cong. & Adm. News, 2213, 2217.

Thus, Congress in drafting the exemption was concerned that requiring equal participation in employee benefit plans by newly-hired older workers could discourage the employment of such workers, since their age would not permit them to accumulate the years of service necessary to make participation in the plans economically feasible. The fact that the exemption contains the proviso "that no such employee benefit plan shall excuse the failure to *hire* any individual" (emphasis added) confirms that Congress was addressing itself to the problem of the worker hired later in his career, and did not intend to validate plans which discriminate on the basis of age against employees such as McCann who have "earned" their benefits through many years of plan membership.

Although we conclude from the legislative history that Congress did not intend retirement plan provisions ever to excuse the failure to hire *or the discharge* of any individual, but only to permit exclusion of some workers *from the plan* on the basis of age where exclusion is justified by economic considerations, we recognize that the statute as drafted does permit an employer to discharge employees "to observe the terms of" a plan. However, as we have already observed, in order to escape condemnation as a "subterfuge," an early retirement provision must have some economic or business purpose other than arbitrary age discrimination.

At oral argument, United's counsel conceded that if its plan, with its involuntary early retirement provision, were adopted now, it would probably violate the Act. Thus, its position is that the plan is immunized because it predates the Act. United rests on the *Brennan* court's conclusion that any action required by a plan predating the Act is valid, since such a plan could never be a subterfuge. While we have already pointed out the fallacy in

this reasoning, it is also refuted by the legislative history. The report states that the exemption "applies to new and existing employee benefit plans, and to both the establishment and maintenance of such plans." It is difficult to reconcile this language with a construction of the statute which would treat new and existing plans *differently*, automatically validating the provisions of existing plans by refusing to inquire into their purpose. In addition, the legislative history makes it clear that the *maintenance* of a discriminatory plan is to be considered independently under the exemption. To avail himself of the exemption, an employer must demonstrate that a plan is not being *maintained* as a subterfuge to evade the Act, as well as showing benign establishment, in order to prevail. United has offered no justification for maintaining its early retirement provision after the Act became effective.[6]

Our reading of the statute and its legislative history is a realistic one. There are over eleven million employees who are members of retirement plans which require retirement before age 65; there are another several million who are members of plans which permit forced retirement before 65.[7] We think it unlikely

6. *Brennan's* conclusion that the subterfuge clause automatically validates the provisions of all pre-Act plans was rejected in Dunlop v. Hawaiian Tel. Co., note 5, *supra*, for much the same reason we discuss in the text. However, the *Dunlop* court upheld a plan permitting involuntary retirement at age 60, based upon an admittedly disingenuous reading of the word "subterfuge" to mean a scheme to retire employees early without payment of substantial benefits. The court felt compelled to reach this result in order to give effect to the Secretary of Labor's interpretative regulation, 29 C. F. R. § 860.110, discussed in note 4, *supra*, which it presumed to mirror congressional intent. The court nevertheless observed that Congress might have intended to allow the exclusion of the aged from a retirement plan but not permit the discharge of aged individuals pursuant to a plan, as we have concluded, in which case "subterfuge" could be given its normal meaning. Apparently the *Dunlop* court did not have the benefit of the Secretary's revised position. Accordingly, to the extent that *Dunlop* relied on the regulation, its authority is weakened.

7. *See* U. S. Dept. of Labor, Monthly Labor Review, Vol. 69, No. 4, p. 41 (April 1973).

that Congress intended to leave the vast loophole in this broad remedial legislation which United would have us fashion. We can foresee no pernicious effects on the nation's employee benefit plans from our decision. Ordinarily, postponement of retirement results in cost savings to a plan providing retirement benefits.[8] If legitimate considerations other than an employer's preference for youth justify the forced retirement of employees before age 65, 29 U. S. C. § 623(f)(2), as we construe it, permits such action.

REVERSED AND REMANDED.

8. Savings come from two sources. Mortality before retirement eliminates or reduces the benefits payable. In addition, the higher retirement age shortens the period during which benefits will be paid to retirees. M. Bernstein, The Future of Private Pensions, 226 (1964).